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No. 04-1103

# In The
# Supreme Court of the United States

BARBARA SCARBOROUGH, Individually and on behalf of decedent, William A. Scarborough; RHONDA SCARBOROUGH HALTERLEIN, Individually and on behalf of decedent William A. Scarborough; WILLIAM SCARBOROUGH, JR., Individually and on behalf of decedent, William A. Scarborough,

*Petitioners,*

versus

CLEMCO INDUSTRIES INC., also known as Clemco-Clemintina Ltd.; PULMOSAN SAFETY EQUIPMENT COMPANY; CENTURY INDEMNITY COMPANY, as successor to CCI Insurance Company as successor to Insurance Company of North America; AMERICAN HOME ASSURANCE CO., AND INTERSTATE INSURANCE COMPANY

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI

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## STATEMENT PURSUANT TO RULE 29.6

Respondent, Clemco Industries Corp., is a privately held corporation, incorporated in and with its principal place of business in the State of Missouri. No parent or publicly held company owns 10% or more of Clemco Industries Corp. stock.

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## STATEMENT OF THE CASE

In 1977, William Scarborough brought a civil action (Scarborough I), in the United States District Court for the Eastern District of Louisiana against his former employers, Coating Specialists, Inc. and Land & Marine Applicators, Inc. He also sued Clemco Industries Corp. (Clemco), and Pulmosan Safety Equipment Co. (Pulmosan). Scarborough claimed that he contracted silicosis as a result of the defendants' combined fault in providing him with defective protective hoods he wore while sandblasting aboard his employers' vessels. At trial, the jury found that he was a seaman and that the vessels operated by his negligent Jones Act employers were unseaworthy because the hoods were defective. *Scarborough v. Clemco Industries*, 391 F.3d 660, 662 (5th Cir. 2004) (App. p. 3).[1]

The matter presently before this Court (Scarborough II), is a wrongful death action brought by Mr. Scarborough's survivors resulting from his death from respiratory failure caused by silicosis on March 21, 2002. *Id.* The Petitioners are bound by the finding in Scarborough I, that their decedent was a seaman and that his claims arose under maritime law. The action of the lower courts in this case is succinctly set forth in the opinion of the United States Court of Appeals for the Fifth Circuit. A brief synopsis is set forth in the text of footnote 2, below.[2]

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[1] Citations to "App." are to the numbered pages of the appendix set forth in the Petitioner's writ application.

[2] The Scarborough II court, in an order addressing various cross motions for dismissal and summary judgment, made the following pertinent findings:

(Continued on following page)

A single question is presented for this Court's review, namely, may the survivors of a seaman recover non-pecuniary damages in a general maritime wrongful death action brought against a non-employer?

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1. Appellants' cause of action against Clemco and Pulmosan for wrongful death arises under maritime law and is subject to federal admiralty jurisdiction.
2. Appellants are precluded by collateral estoppel from arguing that Scarborough was not a Jones Act seaman.
3. Under the uniformity principle announced in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 29, 111 S. Ct. 317, 112, L. Ed. 2d 275 (1990), a Jones Act seaman and his survivors may not recover non-pecuniary damages in a wrongful death suit against a non-employer third party. . . .

264 F.Supp. 2d at 447. The motions for dismissal and summary judgment were denied in the district court's Order and Reasons entered on 16 May 2003 because there were material issues of fact in connection with Appellants' pecuniary damages claims that were in dispute. *Id.* After the pecuniary damages claims were settled, however, the motion to dismiss was granted by the district court in its Final Judgment entered on 1 October 2003.

Appellants now appeal two legal conclusions, contained in the district court's Order and Reasons, based upon which it later dismissed Appellants' claims:

1) Appellants' claims against Clemco, Pulmosan, and Century are subject to federal admiralty jurisdiction.
2) A Jones Act seaman's survivors may not recover non-pecuniary damages against a non-employer third party in a maritime wrongful death action.

As explained below, we affirm the trial court. *Scarborough v. Clemco Industries*, 391 F.3d 660, 662-663 (5th Cir. 2004) (App. pp. 4-5).

## STATEMENT OF RELEVANT FACTS

Petitioners recite numerous facts at pages 5-9 of their petition, however, many of the facts recited are not relevant to the issue presented. Specifically, excerpts of selected testimony alleging that most of Mr. Scarborough's work was performed on permanent oil platforms ignores the fact that in Scarborough I, William Scarborough actively and successfully sought Jones Act status. In Scarborough II, Respondents themselves successfully argued at trial and on appeal that Collateral Estoppel precluded relitigation of the findings upon which Mr. Scarborough had originally prevailed.

Because Mr. Scarborough's survivors no longer argue the inapplicability of maritime law, the case before the Court has been distilled to a wrongful death claim by a seaman's survivors against non-employer defendants.

## SUMMARY OF THE ARGUMENT

The sole issue in this case, whether the survivors of a Jones Act seaman can recover non-pecuniary damages against non-employer defendants, has already been answered by implication by this Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990). Relying on *Moragne* and *Higginbotham*, as well as time-honored principles of statutory construction, this Court in *Miles* concluded that non-pecuniary damages such as loss of consortium and loss of society were not available to plaintiffs in a Jones Act wrongful death action. This Court properly gave effect to Congressional intent that uniform remedies be established in cases involving seamen, whether such cases are brought under the Jones

Act[3], DOHSA[4], or General Maritime Law. The lower courts in this matter correctly concluded that the principle of uniformity applied equally to employer and non-employer defendants.

Having abandoned ship on their previous arguments that maritime law does not apply to this case, Petitioners have set sail on locked rudders to argue policy considerations which ignore both this Court's previous opinions and role in upholding permissible Congressional expressions of public policy and uniformity. As correctly noted by the Fifth Circuit in its opinion below, it would be improper to allow the survivors of a Jones Act seaman to recover non-pecuniary damages when Congress has disallowed the identical kinds of damages in a Jones Act suit. Moreover, the effect on uniformity should this Court reverse the Fifth Circuit is obvious and need not be mentioned.

At the heart of the dispute is a public policy issue, namely, whether non-pecuniary damages should be allowed in these kinds of cases. But precisely because the essence of the matter is one dependent upon Congressional expressions of public policy, this Court should not abandon its role as an interpreter of laws to dive into the murky waters in which the relative merits of permissible Congressional action exist. As noted in Miles, the pertinent statutes clearly show that Congress thought it best that non-pecuniary damages not be allowed. Because Congress has acted broadly, unambiguously, and with clarity, there

[3] The Jones Act sets forth the cause of action for the death of a seaman. 47 U.S.C. § 688.

[4] DOHSA sets forth the cause of action on behalf of anyone who has died on the high seas, and claims may be pursued against non-employer defendants. 46 U.S.C. § 761.

is no admiralty rule-making which this Court should undertake since such action would result in encroachment upon Congressional prerogatives. Indeed, it is difficult to think of *any* action the Court could take within its authority to create substantive admiralty law to grant the relief requested by Petitioners which would not constitute such an encroachment. In this light, Petitioners' arguments boil down to a request that this Court act by taking on a role which the Constitution has specifically allotted to Congress.

On the issue presented, there is no conflict within the federal appellate circuits or with a state court of last resort. Petitioners note that there is some conflict between various district courts on the issue presented. However, such cases are heavily weighed in favor of decisions by district courts within the Fifth Circuit, not all of which support Petitioners' arguments. Following the Fifth Circuit's decision in Scarborough II, the district court cases in Texas and Louisiana, which did allow recovery, are no longer valid. Any new cases arising within the Fifth Circuit will be bound to follow Scarborough II.

Moreover, there is no conflict among the Circuits. Such a circumstance, if it existed, would give Petitioners' arguments considerably more heft. The only Circuits which have considered the issue, namely, the Fifth and the Ninth, are in agreement. See, *Scarborough v. Clemco Industries*, 391 F.3d 660 (5th Cir. 2004); and *Davis v. Bender Shipbuilding and Repair Co., Inc.*, 27 F.3d 426 (9th Cir. 1994), *cert. denied*, 513 U.S. 1000, 115 S. Ct. 510, 130 L. Ed. 2d 418 (1994). Notably, in *Davis* this Court denied certiorari when asked to consider the same issue presented here. The notion advanced by petitioners that there

is an urgent need to resolve the issue is simply not in accord with reality.

## REASONS FOR DENYING THE WRIT

The Petitioners are bound by the findings in Scarborough I that their decedent was a seaman and that his claims arose under maritime law. Although they contested such findings at the Fifth Circuit in Scarborough II, their Petition no longer reflects that they pursue them.

This Court's decision in *Miles* instructs that the remedies available to a seaman, whether brought under the Jones Act, DOHSA, or general maritime law, preclude the recovery of non-pecuniary damages against both employer and non-employer defendants.

In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1172, 26 L. Ed. 2d 339 (1970), this court overruled *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886), creating a general maritime wrongful death cause of action, where the death of a seaman was caused by the negligence or unseaworthiness of a vessel. The Court's conclusion was prompted by a desire for uniformity in maritime actions whether brought under DOHSA, the Jones Act, or general maritime law. As stated by this Court, "... such uniformity will not only further the concerns of the 1920 Acts, but also will give effect to the Constitutionally based principle that federal admiralty laws should be a system of laws co-extensive with, and operating uniformly in the whole country." *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 400-401, 90 S. Ct. at 1788.

Eight years later, this Court, in *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978), addressed the issue of whether non-pecuniary damages were available in a wrongful death action under DOHSA. The plaintiffs in *Higginbotham* unsurprisingly made policy arguments similar to those made here by Petitioners. After addressing them, this Court stated, "We need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Id.* 436 U.S. at 623, 98 S. Ct. at 2014. Like the plaintiffs in *Higginbotham*, Petitioners have advanced policy arguments in support of their position that they are entitled to an independent cause of action based on state law, even though this case factually involves the wrongful death of a seaman. As noted by this Court in *Higginbotham*, policy arguments do not weigh on a court's decision when Congress has spoken. Specifically, this Court recognized that, "... Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements. There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Id.* 436 U.S. at 625, 98 S. Ct. at 2015.

Petitioners cite an article by Professor Robert Force, claiming that *Miles* may have been wrongly decided because maritime tort law is allegedly not "dominated" by statute, an assertion which is certainly open to debate. See, Petition, p. 24. In doing so, Petitioners ignore the fact that, where appropriate, this Court has allowed more liberal non-statutory remedies to co-exist alongside the historically more restricted remedies which have been

specifically spoken to by Congress. See, for example, *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 518 (1996). Thus, the lack of "domination" argument is equally flawed.

Petitioners seek a determination from this Court that, because the Jones Act applies to a seaman's employers only, *Miles* should not apply to a cause of action against a non-employer defendant. This argument ignores this Court's recognition that Congressional intent is well established to provide uniform remedies for cases involving seamen, whether under the Jones Act, DOHSA, or general maritime law, and that such intent shows that non-pecuniary damages are not favored.

In holding that there was no recovery for loss of society in a Jones Act wrongful death action, this Court reasoned that:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman. *Miles v. Apex Marine Corp.*, 498 U.S. at 32-33, 111 S. Ct. at 325-326.

Further, in support of its holding that the estate could not recover for the decedent's loss of future earnings, this court stated:

> We sail in occupied waters. Maritime tort law is now dominated by federal statutes, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and

> those dependent upon them. Congress has placed limits and recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act. . . ."

*Id.* 498 U.S. at 36, 111 S. Ct. at 327-328.

Petitioners, at page 12, of their writ application, ask "why should a non-employer be given a free ride?" This policy argument does not displace the Congressional guidance contained within the Jones Act, DOHSA or this Court's opinions decided under the Acts and general maritime law. The fact of the matter is that Respondents were not given a "free ride." As noted by the district court, both Clemco and Pulmosan paid a significant portion of the employer's portion of the judgment, as the employers were insolvent. Moreover, as noted in Scarborough II, Respondents paid Petitioners' pecuniary losses. If it has been a "free ride," Respondents shudder at the possible cost of a first class ticket.

Petitioner's mention *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 119, 116 S. Ct. 619, 133 L. Ed. 2d 578 (1996), at p. 22 of their Petition, suggesting remedies which could be afforded plaintiffs in hypothetical cases involving longshoremen, maritime workers, passengers and users of jet skis. Their reliance on *Yamaha* is misplaced. *Yamaha* holds that DOHSA does not displace state law for non-seafarers in territorial waters. *Id.* 516 U.S. at 215-216, 116 S. Ct. at 628. *Yamaha* did not overrule *Miles* nor did it make any inroads into uniformity because in *Yamaha*, this court reiterated a basic principle, i.e., that uniformity is required when the plaintiff is a seaman. *Id.* 516 U.S. at 215, 216, 116 S. Ct. at 628. Simply put, *Yamaha* lends no support to Petitioners as it reflects this Court's

appropriate distinction between the remedies afforded classes of claimants to which Congress has spoken and those to which Congress has not.

The petitioners offer hypotheticals in an attempt to question whether the principles of uniformity are an illusion but fail to recognize that each class of plaintiffs must base their action on the specific facts presented. The uniformity mandated in *Miles* pertains to wrongful death actions governed by the Jones Act, DOHSA, and general maritime law. It is unnecessary to go beyond the facts of this case to decide the issue presented because it does not involve a little girl on a jet ski in territorial waters, or a longshoreman's claim, or the claims of a passenger on a cruise ship. It is unnecessary for this court to address these hypotheticals and provide an unnecessary advisory opinion. Here, *Miles* and uniformity apply to petitioners because the factual setting of this case is the wrongful death of a Jones Act seaman which is governed by the Jones Act and general maritime law.

Two federal circuits have addressed the specific issue presented before the court. While petitioners correctly note that there is some conflict between various district courts on the issue presented, there is no conflict within the federal appellate circuits with regard to the precise issue raised herein. In *Davis v. Bender Shipbuilding and Repair Co., Inc.*, 27 F.3d 426 (9th Cir. 1994), *cert. denied*, 513 U.S. 1000, 115 S. Ct. 510, 130 L. Ed. 2d 418 (1994), the court addressed the issue of remedies as to the non-employer

defendant shipbuilder in an action brought by the estates of a Jones Act seaman.[5]

The *Davis* court addressed a specific issue of whether the estate could recover lost future earnings from a non-employer defendant, and held that *Miles* applied with equal weight as to both employer and non-employer defendants. In *Davis*, the estates of seamen who drowned on the high seas sought to recover damages for lost future earnings from a non-employer defendant. The claims against the employer were settled prior to bringing suit against the shipbuilder defendant. The *Davis* court recognized that the decision in their case was controlled by *Miles*. The court specifically noted that neither the Jones Act, nor DOHSA permitted the recovery of the damages sought, and the court therefore was precluded from awarding non-pecuniary damages under general maritime law. *Id.* at 430.

It is significant that the plaintiffs in *Davis* attempted to distinguish their case from *Miles* by emphasizing that the defendant shipbuilder was not a Jones Act defendant. In response, the *Davis* court responded:

> . . . moreover, the principle underlying the Supreme Court's decision in both *Miles* and *Moragne*, is that general maritime law is intended to supplement the statutory remedies created by Congress, not to enhance or replace them. *Miles* instructs the lower federal courts that a claim for lost future earnings is not available in connection

[5] It is noted that the Court of Appeals in this matter recognized and approved the decision in *Davis*. *Scarborough v. Clemco Industries*, 391 F.3d 660, 668 (5th Cir. 2004) (App. p. 16). Petitioners have failed to cite and discuss the *Davis* case in their writ application.

> with a maritime death for which Congress has already provided a remedy and has excluded such damages. The identity of the defendant is irrelevant to these considerations. *Id.* at 430.

In reaching its decision in the case at bar, the Fifth Circuit concluded that:

> It would be improper for this court to allow the surviving spouse and heirs of a Jones Act seaman to recover non-pecuniary damages in this case when Congress has disallowed the recovery of identical damages in a Jones Act suit. The genesis of appellants' claims is maritime through and through. *Miles* plainly limits recovery to pecuniary damages. We will not retreat from the bright directive of *Miles*. The *Miles* opinion is concerned with uniformity in the damages recoverable by a Jones Act seaman, and his survivors, not with uniformity of the types of damages to which various defendants are subjected. . . .
>
> For these reasons, the court finds that neither one who has invoked his Jones Act seaman status, nor his survivors may recover non-pecuniary damages from non-employer third parties. *Scarborough v. Clemco Industries*, 391 F.3d 660, 668 (5th Cir. 2004). (App. p. 16).

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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